No. 01-1289

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,

Respondents.

ON WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

BRIEF AMICI CURIAE OF CERTAIN LEADING SOCIAL SCIENTISTS AND LEGAL SCHOLARS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether this Court should impose federal constitutional limits on state punitive damages law based on flawed, advocate-funded, experimental simulations that contradict the overwhelming social scientific consensus that juries perform rationally in punitive damages cases.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are university professors or hold senior positions at independent research institutions. Each has conducted empirical research on juries, punitive damages, or both. The interest of these amici in this case is to provide the Court with an accurate summary of social science research about jury competence and behavior relating to punitive damages. Short biographies of each amicus are provided in Appendix A.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

A broad social science consensus exists that juries perform rationally in punitive damages cases. Juries award such damages infrequently and in comparatively modest amounts. Such awards typically correspond to the actual or potential harm caused by intentional or grossly negligent tortfeasors. This consensus emerges in more than one dozen studies authored by judges, government researchers, prestigious research institutes, and independent academicians.

The *Brief of Certain Leading Business Corporations as Amici Curiae in Support of Petitioner* (the "Corporate Brief") ignores this broad consensus. Moreover, the Corporate Brief reveals that a single amicus, Exxon (now ExxonMobil) Corporation, commissioned and funded the research that forms the heart of the brief. Corp. Br. at 9 n.16.[2] Exxon commissioned that research after an award of punitive damages against it in the still-pending *Exxon Valdez* case.[3] To reflect the source of

1. Pursuant to this Court's Rule 37, amici state that blanket letters of consent from both parties has been filed with the Clerk of the Court, and pursuant to Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution to its preparation and submission.

2. *See* Elizabeth Amon, *Exxon Bankrolls Critics of Punitives, Then It Cites the Research in Appeal of $5.3 Billion Valdez Award*, NAT'L. L.J., May 17, 1999, at A1.

3. That litigation is still ongoing. "Exxon has gone to court once again to plead its case against a multibillion-dollar [punitive damages] (Cont'd)

the research underlying the Corporate Brief, this brief refers to that research as "Exxon Research."

According to the Corporate Brief, the Exxon Research shows that "juries produce systematically erratic and unpredictable awards." Corp. Br. at 2. The Corporate Brief does not, however, attempt to reconcile its portrait of incompetent juries with the overpowering empirical evidence of rational jury behavior. In addition, the Exxon Research that the Corporate Brief relies on does not include any published study of actual cases. Rather, the published Exxon Research consists entirely of simulated experiments in which mock jurors were asked to perform under conditions that fundamentally differ from those under which real juries operate. This experimental research therefore lacks what social scientists call "external validity." Substantial and reliable experimental research not funded by Exxon also contradicts Exxon's research. The Exxon Research, therefore, supplies no social scientific basis for Corporate Brief's insistence that this Court reshape its punitive damages doctrine.

ARGUMENT

I. The Overwhelming Social Science Consensus Is That Juries Perform Reasonably In Punitive Damages Cases

Social scientific study of punitive damages since the 1980s reveals a pattern of rational jury decisions. The social science consensus is that, with rare individual exceptions, the system operates as it should.

A. Juries Rarely Award Punitive Damages But Do So More Frequently in Intentional Tort Cases

Juries infrequently award punitive damages. This is the consistent finding of more than a dozen studies of jury punitive

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award in the environmental tort suit brought by commercial and subsistence fishermen, landowners and other private parties." L. Jackson, *Exxon Asks Court For Further Cut in Damages Award*, Corp. Leg. Times 58 (Aug. 2002). *See* Exxon's "renewed motion for reduction ... of punitive damages," filed Sept. 11, 2002, in *In re Exxon Valdez*, No. A89-095 CIV (HRH) (D. Ak.).

damages awards in actual cases, including several multistate studies by government agencies (the U.S. Justice Department's Bureau of Justice Statistics ("BJS") in both 2000 and 1995[4] and the U.S. General Accounting Office ("GAO")),[5] by prestigious, non-partisan research institutions (the American Bar Foundation[6] and the RAND Institute of Civil Justice ("RAND")),[7] by Judge Richard Posner and Professor William Landes,[8] and others.[9] The infrequency of punitive awards is

4. U.S. Dept. of Justice BJS Bulletin, *Civil Justice Survey of State Courts, 1996: Tort Trials and Verdicts in Large Counties (1996)*, p. 1 (August 2000) [hereinafter "*BJS 2000*"] (about three percent of plaintiff winners in tort trials were awarded punitive damages; median award was $38,000); BJS Special Report, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties (1995)*, p.1 [hereinafter "*BJS 1995*"] (about six percent of plaintiff winners received a punitive award; median award was $50,000).

5. U.S. GAO, *Product Liability Verdicts and Case Resolution in Five States*, GAO/HRD-89-90, 24, 29 (Sept. 1989) [hereinafter "*GAO Report*"] (punitive damages awarded in 23 of 305 cases decided in five states).

6. Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform 214 (1995) ("punitive damage award activity suggests ... the need for ... skepticism with regard to claims about the increasing frequency of such awards").

7. James S. Kakalik et al., *Costs and Compensation Paid in Aviation Accident Litigation* 27 (RAND 1988) ("punitive damages were not paid on any of the 2,198 closed cases"); Erik Moller, *Trends in Civil Jury Verdicts Since 1985* 33 (RAND 1996) ("punitive damages are awarded very rarely"); Mark Peterson, Syam Sarma & Michael Shanley, *Punitive Damages: Empirical Findings* 10 (RAND 1987) (fewer than seven punitive damages awards per year in Cook County and fewer than six in San Francisco from 1960-1984).

8. William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 304-07 (1987) ("insignificance of punitive damages in our sample is evidence that they are not being routinely awarded").

9. *See, e.g.*, Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623, 633-37 (1997) (summarizing (Cont'd)

also a principal finding of five individual state and county level studies.[10]

These empirical studies of actual cases further show that juries award punitive damages especially rarely in products liability and medical malpractice cases.[11] In contrast, juries

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studies on the decision to award punitive damages) [hereinafter "Eisenberg et al., *Predictability*"]; Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745 (2002) [hereinafter "Eisenberg et al., *Juries & Judges*"]; Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 JUSTICE SYSTEM J. 21 (1993); Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 RUTGERS L. REV. 975, 981-92 (1995) [hereinafter "Rustad & Koenig, *Reconceptualizing*"] (punitive damages rarely awarded in medical malpractice cases).

10. For example, a recent Georgia study concludes, "punitive damages currently are not a significant factor in personal injury litigation in Georgia." Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049, 1094 (2000). A Florida study finds the frequency of punitive damages awards to be "strikingly low." Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. LEGIS. 487, 487 (2001). *See also* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990) (two counties); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 388 (1999) (no punitive awards in medical malpractice or products liability cases in a twelve-year period in Franklin County, Ohio); Neil Vidmar, MEDICAL MALPRACTICE AND THE AMERICAN JURY 254 (1995) (two punitive awards in 1,300 North Carolina medical malpractice cases).

11. *E.g.*, *BJS 2000*, *supra* note 4; *BJS 1995*, *supra* note 4; *GAO Report*, *supra* note 5; Eisenberg et al., *Predictability*, *supra* note 9, at 635-37 (summarizing studies of jury trial outcomes in these case categories); Landes & Posner, *supra* note 8; *Merritt & Barry*, *supra* note 10, at 388 (no punitive awards in medical malpractice or products liability cases in a

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award punitive damages more frequently in intentional tort cases, such as this one.[12] That is both appropriate and expected because, as Professor Cass R. Sunstein (the lead author of the recently published compilation of some of the key Exxon Research articles[13]) and numerous other scholars have noted, intentional torts merit greater punishment than unintentional torts and thus "provide particularly appropriate cases for punitive damages awards."[14] This Court, and many state supreme courts, has embraced this philosophy.[15] In summary, a broad social science

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twelve-year period in Franklin County, Ohio); Rustad & Koenig, *Reconceptualizing*, *supra* note 9, at 991 (summarizing several studies); Vidmar & Rose, *supra* note 10, at 487 ("with the exception of asbestos cases, punitive damages were almost never given in products liability cases").

12. *E.g.*, *BJS 2000*, *supra* note 4, at 1 (twenty-four percent of plaintiff winners in intentional tort trials receive punitive awards); *BJS 1995*, *supra* note 4, at 8; Landes & Posner, *supra* note 8, at 185; Peterson et al., *supra* note 7, at 11, 35.

13. Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade & W. Kip Viscusi, PUNITIVE DAMAGES: HOW JURIES DECIDE (2002).

14. Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2084 (1998). *See, e.g.*, Landes & Posner, *supra* note 8, at 209; A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 909 n.120 (1998).

15. *See, e.g.*, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct"); *Memphis Community School District v. Stachura*, 477 U.S. 299, 306 n.9 (1986) (purpose of punitive damages is to punish tortfeasors for their willful or malicious conduct and to deter others from similar behavior); *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). *See also State Farm Fire & Casualty Co., v. Simmons*, 963 S.W.2d 42, 47 (Tex. 1998); *PPG Indus., Inc., v. Transamerica Ins. Co.*, 975 P.2d 652, 655-56 (Cal. 1999); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 465 (Idaho 1996); *Sorrentino v. All Seasons Serv., Inc.*, 717 A.2d 150, 161 (Conn. 1998).

consensus shows "a picture of reality quite different than the one portrayed in the [Corporate Brief]."[16]

B. Punitive Damages Awards Strongly Correlate With Compensatory Awards

On the infrequent occasions when juries do award punitive damages, the overwhelming evidence is that most such awards strongly correlate with compensatory damages in the same case. BJS data, GAO data, RAND data, and other data all reveal this strong correlation.[17]

C. Independent Reviews of Punitive Awards Find Them to Have Been Appropriately Awarded

Independent analysts who review individual cases of punitive damages rarely find such damages to have been inappropriately awarded. For example, Rustad and Koenig reviewed hundreds of medical malpractice cases covering three decades and concluded that "punitive damages were awarded in only the most egregious cases involving healthcare practitioners."[18] Such egregious cases not infrequently involve sexual contact between medical providers and their patients, including "predatory sexual assaults and abuses of transference techniques by medical personnel."[19]

16. Daniels & Martin, *supra* note 6, at 238.

17. Eisenberg et al., *Juries & Judges*, *supra* note 9, at 752-55 (BJS data); Eisenberg et al., *Predictability*, *supra* note 9, at 637-39, 647-52 (BJS data); Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of* BMW v. Gore *on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59 (1999); *GAO Report*, *supra* note 5, at 29 (punitive damages strongly correlate with compensatory damages); Erik K. Moller et al., *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. LEGAL STUD. 283, 300 n.52 (RAND 1999); Jonathan M. Karpoff & John R. Lott, Jr., *On the Determinants and Importance of Punitive Damage Awards*, 42 J. LAW & ECON. 527, 543 (1999).

18. Rustad & Koenig, *Reconceptualizing*, *supra* note 9, at 1027.

19. *Id.* at 1034-35 (footnotes omitted).

Judge Posner and Professor Landes reached a similar conclusion after reviewing actual products liability punitive awards. They found "evidence of gross negligence or recklessness is plain" in eleven of thirteen cases surveyed[20] and concluded that "the cases as a whole are generally congruent with the formal legal standard for awarding punitive damages."[21] Eisenberg et al., reviewing the most "disproportionate" punitive awards in the BJS data, likewise found the awards to be warranted.[22] Thus, "extreme" awards should be studied and not simply dismissed as pathological: "[f]ollow-up study of the most extreme punitive-compensatory ratios suggests the distortion introduced by relying on extreme awards without further inquiry."[23] Merely relying on headline-grabbing awards, without follow-up, to portray juries as erratic is not scientifically defensible.

II. THE CLAIM OF HIGH REVERSAL RATES IN PUNITIVE DAMAGES CASES IS ERRONEOUS

Yet the Corporate Brief portrays a punitive damages system out of control, with juries incapable of dealing with punitive damages and acting in a haphazard, random fashion. But in countering the consensus view of punitive damages adjudication, the Corporate Brief resorts to creative and misleading case accounting.

The Corporate Brief asserts that high rates of disagreement exist between judges and juries: "The high rate of disagreement between judges and juries on punitive damages stands in sharp contrast to the much lower rates of disagreement (typically around twenty percent) reported in the literature on jury verdicts generally. Jury decisions on punitive damages appear uniquely prone to error." Corp. Br. at 8-9 (footnote omitted).

20. Landes & Posner, *supra* note 8, at 185.

21. *Id.*

22. Eisenberg et al., *Juries & Judges*, *supra* note 9, at 756.

23. *Id.* at 755-56 (footnote omitted). For example, one case involved sexual abuse of a child by a sports coach. Similar examples were found by Vidmar & Rose, *supra* note 10, at 500-05.

To support its claim of high rates of judge-jury disagreement, the Corporate Brief cites studies purportedly showing high rates of judicial reversal or reduction of jury punitive damages awards. But the Brief erroneously reports punitive award modification rates. The Brief cites a RAND study as reporting "high rates of reversal or reduction." *Id.* at 8. It should be expected that "high rates of reversal" would be well beyond the 20% rate the Brief cites as a baseline. In fact, however, that study shows judges and juries disagreed in at most 17.6% of the cases studied.[24] The Corporate Brief similarly distorts the GAO appellate data it cites, in which judges disagreed with juries in at most 21.5% of the cases studied.[25] Searching for empirical support, the Corporate Brief anecdotally reports a handful of large awards. Corp. Br. at 6-7. The use of anecdotes is not only unscientific but each of these anecdotes involves cases that are still pending, so little can be known about judge-jury agreement in any of them.

Finally, the Corporate Brief invokes an unpublished Exxon Research working paper by Hersch and Viscusi.[26] *Id.* That study found fifty-three awards above $100 million—over an 18-year period—an average of three per year. It reports at least twenty-

24. In 35 of 68 trials, defendants paid the original punitive damages trial award, leaving only 33 cases for possible judge-jury disagreement. An additional 21 of the 33 remaining cases settled. Thus there was only room for judicial disagreement with juries in 12 (33 minus 21) of the original 68 cases (17.6%), below the 20% rate that the Corporate Brief cites as the baseline rate of disagreement between judges and juries. Peterson et al., *supra* note 7, at 27-28.

25. The GAO reports 135 cases won by plaintiffs. Of these, 79 were appealed; of these 79 appeals, 49 resulted in a decision on the merits; of these 49 cases, 20 were affirmed. So there is evidence of judge-jury disagreement in at most 29 (49 minus 20) of 135 cases (21.5%), not noticeably different from the 20% baseline rate. *GAO Report*, *supra* note 5, at 105 (tbls. V.11, V.12), 38 (tbl. 3.3).

26. Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, Harvard-Olin Center for Law, Economics, and Business, Discussion Paper No. 362 (unpublished draft May 2002).

two of the awards to have been reduced, eliminated, or pending,[27] though that number cannot be verified.[28]

Even accepting its data at face value, all the study shows is that, in the largest stakes cases, a high appeal rate probably exists, with a concomitant reduction in settlement likelihood. But this hardly distinguishes punitive damages litigation from any other class of cases, in which high-stakes cases tend to be appealed more often—and settled less often—than low-stakes cases.[29] Without examining the mass of punitive award cases, or appeal and reversal rates in other high-stakes cases, the Hersch-Viscusi working paper presents no evidence of unusual rates of judge-jury disagreement in punitive damages cases.

The Corporate Brief thus provides no support for its claim that high reversal rates are evidence of judge-jury disagreement.[30] The Corporate Brief ultimately relies on its own

27. Hersch & Viscusi, *supra* note 26, at 42-43 (notes to tbl. 1).

28. It is difficult to reproduce and verify the study's results and impossible to relate its results to peer reviewed research, such as the published RAND and GAO findings. Case identification information is not supplied. Docket numbers are listed but case locales are not, so one cannot tell where the cases were adjudicated. *Id.* at 39-42 (tbl. 1).

29. Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge: Defendants' Advantage*, 3 Am. L. & Econ. Rev. 125, 149, 158 (2001) (showing positive, significant relation between stakes and the decision to appeal).

30. The other sources relied on by the Corporate Brief consist of a sample of thirteen cases and an advocate's brief. Corp. Br. at 8. The Corporate Brief's reliance on appellate reversals to support a claim of substantial judge-jury disagreement in punitive damages cases is also questionable because it fails to account for the highly filtered nature of appealed cases. The best available comprehensive data, based on an analysis of over 15,000 federal diversity jury trials from 1988 through 1997, is that about twenty percent of trial judgments are appealed, and less than ten percent lead to a definitive resolution on appeal. Clermont & Eisenberg, *supra* note 29, at 125, 131 (tbl. 1) (showing 15,157 trial judgments, an appeal rate of 20.21% and 1,465 affirmances and reversals). Observed reversal rates thus reveal little about rates of judge-jury agreement in the mass of jury trials, most of which are never appealed.

anecdotal assertions, on less than a handful of large awards per year, and on an unpublished study that does not question the propriety of any individual punitive award, an important omission since, as shown in Part I *supra*, researchers who have reviewed individual awards find them overwhelmingly justifiable.

III. The Corporate Brief Caricatures Jury Performance

The Corporate Brief ignores the social science consensus about real-world cases and then fills its artificially-created void with experimental evidence, all of which was funded by Exxon. This Exxon Research reaches conclusions inconsistent with the non-Exxon research consensus.

A. The Corporate Brief Ignores the Real-World Evidence about Punitive Damages

The Corporate Brief boldly sweeps away the social science consensus reported in Part I, stating that "little was known" about how juries decide punitive damages "until recently," when the Exxon Research was published. Corp. Br. at 1. The truth is that much has been known about how juries decide punitive damages for over two decades. As Part I shows, juries most frequently award such damages in cases of intentional misconduct, rarely award them in products liability and medical malpractice cases, and award them in a way that correlates strongly with the level of harm caused by the defendant. In short, juries punish the most egregious wrongdoers with largely explicable levels of awards. The Corporate Brief dismisses this broad-based and sobering knowledge about how juries decide punitive damages.

B. Exxon Research Experiments Fill the Artificially Created Void

Having distorted or swept away the data about actual cases, the Corporate Brief fills its contrived evidentiary void by relying on Exxon Research mock jury experiments that, as Parts IV to VI, *infra*, show, provide little support for the Corporate Brief's anti-jury policy recommendations. Even if the Exxon experiments

were more persuasive, their experimental evidence cannot stand against the social science consensus based on real-world data.

When real-world data contradict simulation research, social science theory prescribes that the real-world data are more probative. All simulation studies and the theory underlying those studies must be checked for correspondence with the real world before sound conclusions bearing on policy can be reached.[31] Indeed, one Exxon researcher, accepting the position of other theorists,[32] states in a chapter on research methodology, "[g]iven a specific interpretation of [a] theory, its consequences can be treated as predictions to be compared with data from the real world to determine the degree of correspondence between the theory and the world."[33] Importantly, legal doctrine is in complete accord.[34] In view of the social science consensus about real-world punitive damages cases, Exxon Research studies are entitled to little weight.

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31. Marilyn Brewer, *Research Design and Issues of Validity, in Handbook of Research Methods* in Social and Personality Psychology 12 (Harry T. Reis & Charles M. Judd eds. 2000); Shari Diamond, *Illuminations and Shadows from Jury Simulations*, 21 Law & Hum. Behav. 561 (1997).

32. *See* Morton Deutch & Robert Krauss, Theories in Social Psychology 6-13, 215-16 (1965).

33. Reid Hastie & Garold Stasser, *Computer Simulation Methods for Social Psychology*, in Reis & Judd, *supra* note 31, at 85.

34. Thus, "[b]eginning with Judge Weinstein's opinion in the *Agent Orange* litigation [nearly two decades ago] courts have frequently expressed a preference for epidemiological evidence over other types of evidence such as [experimental or laboratory] animal studies." D. Faigman, D. Kaye, M. Saks, & J. Sanders, *How Good Is Good Enough?: Expert Evidence under Daubert and Kumho*, 50 Case W. L. Rev. 645, 659 (2000). *See Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1314 (11th Cir. 1999). *See* M. Green, D. Freedman & L. Gordis, *Reference Guide on Epidemiology*, in Federal Judicial Center, Reference Manual on Scientific Evidence 333, 346 (2d ed. 2000) (data from human studies preferable to lab experiments); Environmental Protection Agency, *Proposed Guidelines for Carcinogen Risk Assessment*, 61 Fed. Reg. 17,960, 17,972-73 (1996).

C. The Only Exxon Research Studying Actual Cases Is a Flawed Working Paper

The Corporate Brief tries to fill the actual-case gap in Exxon Research with last-minute research, the unpublished Hersch-Viscusi working paper.[35]

Ironically, Hersch-Viscusi accept much of the social science consensus. Thus, they do not question that punitive damages are rarely awarded, that they are awarded more frequently in cases of intentional misbehavior, and that, when awarded, the BJS and other data show that punitive damages strongly correlate with compensatory damages.[36]

Hersch-Viscusi do, however, purport to find substantial differences in the punitive award behavior of judges and juries. Their working paper contradicts decades of non-Exxon research social scientific findings.

First, the judge-jury differences Hersch-Viscusi purport to find are inconsistent with non-Exxon studies of judges and

35. Hersch & Viscusi, *supra* note 26. This study has two major parts, one discussed in Part II *supra* that focuses on large cases and one that analyzes the BJS data.

36. Hersch-Viscusi claim to find little relation between punitive and compensatory awards in cases with punitive damages in excess of $100 million. But this claim depends on their mistaken analysis of *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-8273 CA 22 (Fl. Cir. Ct., 11th Jud. Dist., Dade Cty. Nov. 6, 2000). Hersch-Viscusi compute the punitive-compensatory ratio in that case using the $145 billion punitive award on behalf of hundreds of thousands of Florida smokers. Hersch & Viscusi, *supra* note 26, at 42 (tbl. 1). The $12 million compensatory award they use was awarded to four representative plaintiffs, not to the class receiving the punitive award. *E.g.*, *Tobacco Companies Ordered to Pay $145 Billion in Punitive Damages*, 15 ANDREWS TOBACCO IND. LITIG. REP. 3 (No. 15, July 14, 2000). The compensatory harm for purposes of computing the ratio must be with respect to the same group as that covered by the punitive award. Hersch-Viscusi should have estimated the compensatory harm to the punitive class before calculating the ratio. Their reported ratio of 11,407.196 is absurd. Hersch & Viscusi, *supra*, at 42 (tbl. 1) (last entry).

juries. Second, the Hersch-Viscusi finding of substantial judge-jury differences in propensity to award punitive damages is inconsistent with what the BJS reports—about four percent of successful plaintiff trials before both judges and juries lead to punitive awards[37]—and with other analyses of the same data by non-Exxon researchers. Third, the Hersch-Viscusi analysis mistakenly handles the importance of case routing. Because of higher-stakes, more punitive-damages-prone cases are routed to juries. Thus, any differences Hersch-Viscusi detect could be an artifact of judges and juries seeing different cases, not of differences between judges and juries.

1. Other Judge-Jury Studies Contradict Hersch-Viscusi

Study of judge-jury differences traces its modern roots to the classic Kalven and Zeisel study. Kalven and Zeisel's questionnaires to presiding judges in about 4,000 actual civil jury trials in the 1950s showed a seventy-eight percent agreement rate between judge and jury on liability.[38] The rate of agreement is high compared to other human endeavors,[39] and consistent with subsequent social science research.[40]

37. *BJS 2000*, *supra* note 4.

38. Harry Kalven, Jr. & Hans Zeisel, THE AMERICAN JURY 63-64 (2d ed. 1971). *See also* Hans Zeisel, *The American Jury*, in THE AMERICAN JURY SYSTEM 65, 69-70 (1977); Marc Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 204-05 (reporting more recent polls supporting similar results).

39. When compared to other human decisionmakers, the rate of agreement is more impressive than it first appears. This 78% agreement rate is better than the rate of agreement between scientists doing peer review, employment interviewers ranking applicants, and psychiatrists and physicians diagnosing patients, and almost as good as the 79% or 80% rate of agreement between judges making sentencing decisions in an experimental setting.

Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1153 (1992).

40. Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 854 (1998) (summarizing

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More recent studies corroborate Kalven and Zeisel, finding that judges (who are perhaps best-positioned to assess juries) substantially agree with juries. For example, Hannaford, Hans, and Munsterman, in a recent study of Arizona juries, found that judges reported disagreeing with civil jury verdicts in less than twenty percent of 161 civil trials.[41] Sentell, in a 1990s study in Georgia, found that the judges gave strong positive evaluations of juries' competence and fairness. Judges reported that they agreed with juries at a rate that equaled or exceeded the rate found in the Kalven and Zeisel study.[42] A survey of judges also finds them strongly in agreement with juries. Sixty-one percent of over 400 state and federal judges said they disagreed with civil jury verdicts no more than ten percent of the time; and two-thirds of them said jury awards were excessive in only a few or "virtually no" cases.[43]

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studies of judge-jury similarity); Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 812 (1999) ("commonly voiced speculations about the inability or irrationality of jurors in evaluating injuries are misconceived, because on that task jurors were nearly indistinguishable from judges and lawyers"); *cf.* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1500-02 (1999) (asserting that there is only slight evidence of differences); Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883 (1993) (finding jury-arbitrator similarity with respect to awards for pain and suffering and the rationales behind the awards).

41. Paula L. Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359, 371 (2000). For evidence of substantial judge-jury agreement in complex cases, see Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Effects*, 18 LAW & HUM. BEHAV. 29, 48 (1994) (tbl. 13).

42. Perry Sentell, *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85 (1991); Perry Sentell, *The Georgia Jury and Negligence: The View from the (Federal) Bench*, 27 GA. L. REV. 59 (1992).

43. *The View from the Bench, A National Law Journal Poll*, NAT'L L.J., Aug. 10, 1987, at 1.

That judges occasionally disagree with juries of course does not establish that the two decisionmakers disagree to a troubling extent. Two judges hearing the same case could well disagree at rates similar to or beyond those observed for judge-jury differences.

2. Hersch-Viscusi's Flawed Analysis

The simple story in the BJS data is one of judge-jury similarity. The BJS data show punitive awards in about four percent of both jury trials and judge trials, which Hersch-Viscusi acknowledge.[44] The Eisenberg et al. analysis attacked by Hersch-Viscusi shows that this similarity survives when one accounts for different case categories (for example, products liability and fraud) and for different case locales.[45] To salvage the Hersch-Viscusi results in the face of non-Exxon contrary evidence, the Corporate Brief states that Eisenberg et al.'s failure to find evidence of substantial judge-jury differences "is the product of a faulty statistical analysis." Corp. Br. at 23. This is questionable both because of weaknesses in the Hersch-Viscusi study and the unique qualifications of the research team the Corporate Brief attacks. Hersch-Viscusi (1) fail to properly account for the design of the sample producing the data, and (2) base their analysis on incorrect legal standards and dubious statistical analysis. Hersch-Viscusi mis-analyze the data in a manner that makes the core judge-jury similarity (punitive awards in four percent of plaintiff wins) disappear. Furthermore, the Eisenberg et al. team included both a renowned statistician and the very researchers who gathered the BJS data used by Hersch-Viscusi.[46]

44. Hersch & Viscusi, *supra* note 26, at 44 (tbl. 2).

45. Eisenberg et al., *Juries & Judges*, *supra* note 9, at 760, 762.

46. Professor Martin T. Wells, a Cornell University professor of statistics, is a co-author of the study attacked by Hersch-Viscusi. His credentials include service on the editorial board of the Journal of the American Statistical Association, arguably the world's leading statistics journal. Neil LaFountain, Brian Ostrom, and David Rottman, from the non-partisan National Center for State Courts, gathered the BJS data used by Hersch-Viscusi.

It is axiomatic that analysis of complex survey designs (such as those developed and used by the BJS in gathering data on punitive damages)[47] must account for the sample design.[48] Yet, Hersch-Viscusi neglect the sample design.[49] Indeed, in their only analysis that properly accounts for the sample design, Hersch-Viscusi, consistently with Eisenberg et al., report no significant difference between judges and juries in awarding punitive damages.[50] Thus, Hersch-Viscusi's neglect of the sample design explains the inconsistency between non-Exxon research reports of judge-jury similarity in rates of awarding punitive damages and Hersch-Viscusi's finding of judge-jury difference.[51]

47. The BJS stated in its publications and its public release of the data that a complex survey design was used. *BJS 2000*, *supra* note 4; *BJS 1995*, *supra* note 4.

48. *E.g.*, Peter H. Rossi et al., *Sample Surveys: History, Current Practice, and Future Prospects*, in HANDBOOK OF SURVEY RESEARCH 1, 17 (Peter H. Rossi et al. eds. 1983) (analysis must be "sensitive to the formal characteristics of the data").

49. Hersch-Viscusi report twenty-two regression models purporting to assess judge-jury differences. Hersch & Viscusi, *supra* note 26, at 55 (tbl. 9). In only two of those twenty-two models do they even appear to account for the complex survey design. The only two models that appear to account for the survey design are in the row they label "sampling weights." *Id.* Those two models split about whether a statistically significant judge-jury difference exists. In the better of the two models, the one that accounts for the skewness of the compensatory award data, no significant effect emerges.

50. *Id.* at column (2).

51. The Corporate Brief erroneously attributes the difference to Eisenberg et al. using "two jury-related control variables that were highly correlated with one another, and thus masked the significant effect of jury trials on punitive awards." Corp. Br. at 23 n.42. The common four percent judge-jury rate of awarding punitive damages for judges and juries belies the suggestion that some sophisticated data manipulation masked any judge-jury differences. In any event, Hersch-Viscusi did not use the same models as Eisenberg et al. Running those models without

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Additional statistical and legal errors further undermine this lone Exxon real-case study. The study confuses class-based relief with individual relief[52] and employs questionable statistical techniques to explore the punitive-compensatory relation. The extreme punitive damages awards they study require special statistical techniques that they do not use.[53]

3. Failure to Account for Case Routing Between Judge and Juries

Even if the Hersch-Viscusi analysis had been properly executed, it would not support an inference of extreme jury behavior. Hersch-Viscusi and the Corporate Brief claim that juries have been responsible for about ninety-eight percent of

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one of the "highly correlated" variables does not affect the results. The Corporate Brief also states that Eisenberg et al. "did not adequately control for the influence of one county (Harris County, Texas)". *Id.* This is incorrect. Eisenberg et al. *highlighted* the need to conduct the analysis to account for Harris County and did so. Eisenberg et al., *Juries & Judges*, *supra* note 9, at 748 ("The analyses reported here include Harris County, but we report throughout the Article whether inclusion of Harris County materially affects results.").

52. This leads them to compute erroneous punitive-compensatory ratios. *See* note 36 *supra*. Yet it is such ratios that they rely on to criticize jury performance.

53. Hersch & Viscusi, *supra* note 26, at 9-10. The statistics discipline of extreme value theory provides a class of models to deal with such extreme data. By definition, extreme values are scarce and Hersch-Viscusi's need to survey eighteen years of data to find fifty-three extreme punitive damages awards indicates that the awards they analyze are in fact extreme. The scarcity of extreme values means that estimates are often required for levels of awards that are much greater than those that are usually observed. Applications of statistical methods for extreme values originated in hydrology and civil engineering; however there are now applications of these statistical models in portfolio adjustment in the insurance industry, risk assessment on financial markets, and traffic prediction in telecommunications. Data analysis methodology for extreme data is well developed, S. Coles, AN INTRODUCTION TO STATISTICAL MODELING OF EXTREME VALUES (2001).

the largest punitive damages awards. Corp. Br. at 23. (Because of the Hersch-Viscusi study's unpublished, working-paper status, it is not known whether this percent will survive. It is currently incorrect because the study omits at least one highly visible $600 million dollar punitive award by a judge.[54])

This claim overlooks the fact that litigants systematically route both tort trials and larger-stakes cases to juries.[55] The BJS data show that over eighty-five percent of tort trials are before juries.[56] So, on a simple pro rata basis, eighty-five percent of any class of awards (punitive or other) is likely to be by juries. This fact takes on added importance when combined with the fact that amounts demanded in jury trials exceed amounts demanded in judge trials.[57] So, among the eighty-five percent of tort trials flowing to juries are also a disproportionate number of high-stakes cases. With the routing of both tort claims and large-stakes claims to juries, it is hardly surprising that more than ninety percent of the largest punitive awards come in jury trials. The claim that

54. *Avery v. State Farm Mutual Auto. Ins. Co.*, 746 N.E.2d 1242, 1249 (Ill. App. 2001) (appeal pending before Illinois Supreme Court). The judge's punitive award was made in 1999, well within the time period covered by the Hersch-Viscusi study. While Hersch-Viscusi overlook *Avery*, another brief in this case erroneously attributes this large punitive award to a jury. *Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner*, at 13 ("case starkly illustrates the danger, and manifest unfairness, of allowing juries [*sic*] to punish the defendant").

55. Eric Helland & Alexander Tabarrok, *Runaway Judges? Selection Effects and the Jury*, 16 J.L. Econ. & Org. 306, 323-27 & tbl. 4, app. A, at 330 (2000). *See also* Clermont & Eisenberg, *supra* note 39, at 1162-65.

56. *BJS 2000*, *supra* note 4, at 2 (tbl. 1).

57. Clermont & Eisenberg, *supra* note 39, at 1177, app. B; Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which is Speedier?*, 79 Judicature 176, 180 (1996).

judges differ from juries is meaningless unless one accounts for this case routing.[58]

Thus, the Corporate Brief's only real-world support for its attack on juries is based on misunderstanding of legal data, analysis of data using incorrect statistical techniques, and failure to account for the routing of tort cases and high-stakes cases between judges and juries.

D. The Corporate Brief's Effort to Undermine the Correlation between Punitive and Compensatory Damages Fails

Substantial evidence exists of a strong correlation between punitive and compensatory damages. Part I.B *supra*. The Corporate Brief argues that the strong correlation between punitive and compensatory damages is "misleading" because it requires that the awards be transformed to logarithms. Corp. Br. at 14.

This accusation is statistically incorrect. The distributions of punitive and compensatory awards, like many dollar amounts, are "skewed," that is, they do not follow a normal distribution—the distribution of "bell-curve" fame.[59] Many statistical analyses are only valid as applied to normally distributed data. Before testing hypotheses one must first check to see if the assumptions of the underlying statistical model hold. This is the first step in

58. Hersch-Viscusi claim that not accounting for the routing of cases between judges and juries "will affect our results and [Eisenberg et al.'s] similarly." Hersch & Viscusi, *supra* note 26, at 22. This is incorrect. Eisenberg et al. find little evidence of judge-jury difference in awarding punitive damages and show that accounting for routing makes the Eisenberg et al. finding conservative because it would cause their study to overstate judge-jury differences. Eisenberg et al., *Juries & Judges*, *supra* note 9, at 766-67. Since they claim no such differences, routing concerns do not undermine their results. Hersch-Viscusi cannot make the same claim because routing of high stakes, punitive damages-prone cases to juries could completely explain their results, which purport to find judge-jury differences.

59. Eisenberg et al., *Predictability*, *supra* note 9, at 647 n.59.

data analysis and is one of the first topics in an elementary statistics course. A simple look at the data reveals that the BJS data are highly skewed.[60] An appropriate model for the BJS data that compensates for the skewness of the data is the lognormal distribution.[61]

Contrary to the Corporate Brief's assertion, analyzing transformed data is a standard practice, one Exxon researchers follow in other articles.[62] Important financial and pharmacokinetic relations emerge only when amounts are transformed into logs. For example, the Nobel-prize-winning Black-Scholes pricing of options formula assumes that the natural logarithms of stock prices are normally distributed.[63] In this model, real-world prices are measured in log dollars. Financial and risk management officers of large companies do not question the Black-Scholes model because it depends on a log transform of dollar amounts. These same officers cannot credibly question the validity of other financial effects, including punitive damages risks, that emerge most clearly after log

60. Eisenberg et al, *Juries & Judges*, *supra* note 9, at 753 n.37; Hersch & Viscusi, *supra* note 26, at 44 (tbl. 2) (mean and median reported establish skewness of the data).

61. It is well known that analyzing the lognormal data is equivalent to analyzing the logarithmically transformed data as if it were normally distributed. R.J. Carroll & D. Ruppert, TRANSFORMATION AND WEIGHTING IN REGRESSION 4 (1988). Hersch-Viscusi models of the BJS data that do not transform using logarithms, *see* Hersch & Viscusi, *supra* note 26, at 19, 20, implicitly assume a normal distribution of awards, which is an incorrect assumption. When using the wrong model one will generally get biased or inconsistent estimates. Y. Pawitan, IN ALL LIKELIHOOD: STATISTICAL MODELING AND INFERENCE USING LIKELIHOOD 370 (2001). Hence any substantive conclusions reached from these estimates are suspect and unworthy of scientific acceptance.

62. *E.g.*, Edward J. McCaffery, Daniel I. Kahneman & Matthew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1358-59, 1368 (1995) (study by an Exxon-researcher (Kahneman) using log transformation of dollar amounts).

63. Fischer Black & Myron Scholes, *The Pricing of Options and Corporate Liabilities*, 81 J. POL. ECON. 637 (1973).

transforms. Similarly, medical researchers regularly analyze logarithmically transformed data.[64]

IV. EXXON RESEARCH PRESENTS DESICCATED FACT AND LAW TO MOCK JURIES THAT ARE UNREPRESENTATIVE OF ACTUAL CONDITIONS UNDER WHICH JURIES OPERATE

The Corporate Brief claims that Exxon Research shows "that juries are uniquely unsuited to perform the 'institutional' punitive and regulatory task on which the Utah Supreme Court predicated its reinstatement of the extraordinary award in this case." Corp. Br. at 24. The Brief cites an Exxon Research article by Schkade et al. who assert that, while juries obtain information about the defendant's conduct during the trial, key information relevant to mitigation and reasonable punishment is usually withheld.

In fact the Exxon Research mock juries had almost none of the information or legal guidance real juries receive. Moreover, the jurors were asked to operate under conditions that seriously compromise the ability to generalize to real world juries. These limitations probably help explain why the social science consensus about punitive damages, see Part I *supra*, so contradicts the Exxon Research.

Consider the Sunstein et al. article discussing mock jury assessment of punitive damages.[65] The experiment was conducted in a "downtown motel" and "[m]ost respondents completed their task in thirty to forty-five minutes."[66] Each respondent received three pages of general instructions and some specific instructions on the law. Each of the mock jurors answered questions about a number of scenarios ranging from "about one" to five scenarios[67] concerning an injury suffered by a person. The scenarios ranged between six and ten sentences,

64. J.K. Lindsey, NONLINEAR MODELS IN MEDICAL STATISTICS 110 (2001).

65. Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998) (methodology reported in an appendix to the article at 2146-53).

66. *Id.* at 2146.

67. *Id.*

with a median of eight sentences. The scenarios reported that compensatory damages had already been awarded. After reading each scenario the mock juror was asked to respond to two six-point rating scales measuring how much the defendant should be punished and a third question asking about the dollar amount that should be awarded as punishment.

The mock juries in this experiment lacked most of the information, or the time for individual reflection and joint deliberation, that is available to real juries. The study lacked any semblance of what social scientists refer to as ecological validity—a subcategory of external validity bearing on sufficient relation to real-world conditions. In the thirty to forty-five minutes allotted for the experiment, each juror was required to respond to more than one case; the compensatory damages were a given; the subjects in the experiment did not have the advantage of deliberation with other persons; the instructions on how to set damages were minimal; and the fact pattern was provided in a few sentences. Significantly, each of the experimental fact patterns was concerned with a negligent personal injury claim rather than the kinds of intentional tort claims that are the subject of the present litigation and that also are the basis of a disproportionate percentage of punitive damages awards.

Another article, by Sunstein et al., focusing on the question of "optimal deterrence,"[68] provided subjects with brief instructions explaining the difference between civil and criminal lawsuits and brief instructions on the purposes of punitive damages and the standard of proof for such damages. The mock jurors were presented with three personal injury case synopses; the longest of the three consisted of fourteen sentences.[69] One of these fourteen sentences told the mock jurors that a jury had already determined that the defendant was liable and had assessed an amount of *compensatory* damages. Another sentence instructed the subjects as follows:

68. Cass Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 (2001).

69. *Id.* at 251-53.

> In situations like this, victims who deserve compensation do not always receive compensation because (1) they don't know what caused their condition and therefore don't sue, (2) they don't know that they can sue, or, (3) they sue and lose, even though they deserve to win under the law, because their lawyers are not good enough.[70]

Without further instructions, the subjects were asked to specify the amount of punitive damages they believed was appropriate.

As in the previous article, the fact situations and the instructions were minimal compared to those presented to real juries. There was no opportunity to deliberate, nor did any of the cases presented deal with fraud and bad faith claims that are at the core of the findings against State Farm in the instant case.

The Corporate Brief recognizes that the study of individual mock jurors in most Exxon Research does not reproduce jury deliberations. So the Brief invokes the small fraction of Exxon Research mock jury simulations that did include collective mock deliberations. Corp. Br. at 12-14. In the *Deliberating About Dollars* simulation study[71] the jurors viewed a videotape of a personal injury trial and were provided with a written version of the scenario. The article does not report the length of the videotape but the total script for one of the scenarios reported in the article's appendix consists of one page.[72] A professional actor read the script that presented both the facts and each party's arguments.[73] The fact scenarios stated that a jury previously decided liability and had awarded $200,000 in compensatory damages. Next, the subjects were instructed to make individual judgments on one of two issues: the "appropriate level of punishment" on an eight-point scale or an amount of punitive damages. Then the subjects were assigned to six-person mock

70. *Id.* at 252.

71. David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000).

72. *Id.* at 1174.

73. *Id.* at 1150.

juries and told they had thirty minutes to reach a unanimous decision on the issue that they had just individually decided.[74] Next, the subjects were then asked for individual judgments on the other issue they had not answered previously, "appropriate level of punishment" or damages. Finally, in the fourth stage of the experiment, their simulating jury partners were given another thirty minutes to reach a unanimous decision.

Although the *Deliberating About Dollars* experiment used an experimental design that may be appropriate to test certain hypotheses, its similarity to real jury conditions is highly questionable. In addition to an impoverished fact and instruction setting, and hypothetical situations dealing with negligent personal injury rather than fraud and bad faith claims, the decision-making procedure in the experiment does not correspond with the procedure under which real juries operate. Juries do not deliberate with instructions on rating scales, and they do not deliberate in two separate sessions during the punitive phase of the trial. One cannot tell how asking individual jurors to first make individual decisions before deliberating affected the subsequent deliberation process, including the setting of damages. The "higher than expected" and "greater than appropriate" post-deliberation awards found in this research may well be attributable to the atypical conditions presented and procedures employed.

Hastie et al.'s experiment on deciding liability for punitive damages[75] is also far removed from the conditions under which real juries operate. The most crucial flaw is that the stimulus materials asked the simulating jurors to make decisions on law, a matter that is the sole province of the judge.[76] This fact alone

74. *Id.* at 1149.

75. Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 287 (1998).

76. See Neil Vidmar, *Juries Don't Make Legal Decisions! And Other Problems: A Critique of Hastie et al. on Punitive Damages*, 23 LAW & HUM. BEHAV. 705 (1999), for a full critique of the problems with the experiment including interpretations of data.

renders the experiment irrelevant to decision-making about punitive damages. Like the other Exxon simulation experiments, the written factual summaries presented to the subjects were brief, between 1000 and 1500 words and liability and compensatory damages were stipulated as having been previously decided. The videotape presentations of the evidence, including the evidence and the judge's instructions on the law, for each jury ranged from eleven to fifteen minutes.[77]

All of the Exxon studies reviewed above are also subject to the criticism that the jurors were not under oath and were faced only with hypothetical tasks. Although carefully conducted mock jury studies can elucidate many important issues relevant to understanding jury behavior,[78] an enormous gap exists between the conditions created in the Exxon experiments and the conditions under which real juries decide punitive damages. Certainly those studies do not support the Corporate Brief's sweeping conclusions.

Scholarly critiques of the Exxon Research simulations and experimental research by independent scholars demonstrate the questionable applicability of the Exxon mock jury simulations to real juries. An experiment by Greene et al. presented 559 jury-eligible students with summaries of three personal injury cases that were based on real cases in which punitive damages had been awarded.[79] The authors concluded, inter alia, that, while defendant wealth did not influence compensatory damages, it was positively related to punitive damages. This suggested that jurors were sensitive to the legal issues involved in punitive damage awards.[80]

77. Hastie et al., *supra* note 75, at 290-92.

78. Shari Diamond, *Illuminations and Shadows from Jury Simulations* 21 LAW & HUM. BEHAV. 561 (1997); Brian Bornstein, *The Ecological Validity of Jury Simulations, Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75 (1999).

79. Edith Greene et al., *Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?*, 24 LAW & HUM. BEHAV. 187 (2000).

80. *Id.* at 197.

In a mock jury experiment that dealt with issues relating to bifurcated trials, Landsman et al. compared individual juror decisions and deliberating jury decisions in response to a realistic product injury claim that asked the subjects to render verdicts about both compensatory and punitive damages.[81] Although slightly over fifty-one percent of the individual *jurors* indicated that they would find the defendant liable, only twenty-one percent of the deliberating *juries* found the defendant liable.[82] This experiment has many differences from the Schkade et al. experiment,[83] but the important point is that it found that jury deliberation moderates rather than exacerbates verdict decisions.

Professor Richard Lempert of the University of Michigan Law School and Department of Sociology reviewed the Hastie-Viscusi experiment on hindsight bias[84] invoked by the Corporate Brief. Corp. Br. at 20-22. Professor Lempert found the study to be badly deficient in several ways, including external validity.[85] After reviewing the experiment, Lempert concluded that the study:

> tells us almost nothing about the likely magnitude of inappropriate hindsight effects on punitive damage verdicts. The study's external validity is sufficiently low, given the many differences between the experimental conditions and the situations of actual juries, that generalizing from the study's results to actual juries would be risky.[86]

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81. Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297.

82. *Id.* at 322.

83. Schkade et al., *supra* note 71.

84. Hastie & Viscusi, *supra* note 26.

85. Richard Lempert, *Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867 (1999).

86. *Id.* at 876 (also noting "design flaws so substantial as to undercut its experimental findings").

Exxon Research's inconsistencies with non-Exxon mock jury studies, as well as Exxon Research's own limitations, establish that Exxon Research should not trump the social science consensus, summarized in Part I *supra*, that juries are responsible adjudicators of punitive damages issues.

V. THE CORPORATE BRIEF PROVIDES NO EVIDENCE THAT SHIFTING RESPONSIBILITY TO JUDGES WOULD IMPROVE PUNITIVE DAMAGES DECISIONMAKING

The Corporate Brief relies primarily on the Exxon Research experiments to purportedly establish the unsuitably of juries to the punitive damages task. Corp. Br. at 6-21. Even if the research's limitations, see Part IV *supra*, were less numerous or severe, the question remains whether reducing jury responsibility would improve the system. That question depends on a comparative assessment of judges and juries because *some* adjudicator must make the punitive damages decision. Simulations of jury decision-making reveal nothing about the desirability of shifting more punitive damages responsibility to judges.

The Corporate Brief only summarily addresses judge-jury comparisons. Corp. Br. at 22-23. Most of that treatment relies on the flawed Hersch-Viscusi study. *Id.*

Exxon experimental research relating to judges and juries suffers from additional limitations, including sample bias.[87]

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87. The sample of judges used in the experiments is not representative. The judges were attendees at a law and economics program. W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 109 (2001). Such a group of judges is more likely to respond based on economic efficiency than a random sample of judges, especially to questions whose "right" answers depend on the ability and willingness to engage in cost-benefit analysis. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 818 n.201 (2001) (noting problems with the sample in the Hastie & Viscusi studies).

In addition, the experiments may elicit greater punitive damages rates from jurors because the experimenters offer jurors only punitive damages as a remedy. Reid Hastie & W. Kip Viscusi, *What Juries Can't*

(Cont'd)

Like the Hersch-Viscusi study, the Corporate Brief simply ignores the social science evidence, summarized in Part III.C.1 *supra*, that judges and juries are much more similar than different. The Corporate Brief also overlooks the existence of non-Exxon research reporting similar punitive damages behavior by judges and jury-eligible citizens.[88]

In short, the Corporate Brief presents no credible evidence that reducing the jury's time-honored role by shifting responsibility to judges would improve punitive damages decision-making.

VI. Scholars Reject Exxon Researcher's Conclusions

The Corporate Brief invokes Exxon Research to support sweeping policy recommendations about punitive damages. Non-Exxon scholars have noted that Exxon researchers regularly overstate the implications of the Exxon Research experiments that contradict the social science consensus.

Professor Lempert, after reviewing an Exxon punitive damages study, rejected its policy recommendations about punitive damages:

> The authors . . . do not make an adequate social science case for this change [their recommendation that juries should not decide punitive damages], and their recommendation that this should be done deserves *no* weight in any policy arenas.[89]

In another mock jury study bearing on products liability and punitive damages, Exxon researcher Viscusi paid solicited persons forty dollars to participate in a survey. Based on a fifteen-minute segment of that survey in which subjects were presented

(Cont'd)

Do Well: The Jury's Performance As a Risk Manager, 40 Ariz. L. Rev. 901, 905 (1998). A punitive award is the only way for the jurors to express disapproval of behavior. Judges would know that the existence of a compensatory award already expresses disapproval of the behavior.

88. Jennifer K. Robbennolt, *Punitive Damages Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 Law & Hum. Behav. 315, 327-28 (2002).

89. Lempert, *supra* note 85, at 870.

with five scenarios about risks at issue in product liability cases,[90] Viscusi concluded that either juries should not be allowed to award punitive damages in product liability cases or punitive damages should be abolished.

Not surprisingly, members of the scholarly community found Viscusi's recommendation far-fetched. Dr. Steven Garber, Senior Economist at RAND, concluded that Viscusi's recommendation is a "key policy recommendation that lacks foundation."[91] In a critique of both Viscusi's conceptual reasoning and the adequacy of his mock jury research, Garber concluded that "[t]he supporting argument and evidence are . . . far from compelling."[92]

Dr. Robert MacCoun, a professor in the Jurisprudence and Social Policy Program at the School of Law and the Goldman School of Public Policy at Berkeley, also commented on this Vicsusi article. He concluded: "Viscusi's data on their own are clearly too modest to support his sweeping call to either remove punitive damages judgments from the jury or eliminate punitive damages altogether."[93]

Finally, Jennifer Robbennolt, a Senior Fellow at the Center for the Study of Dispute Resolution and a professor of law at the University of Missouri Law School, reviewed the

90. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547 (2000). After reading the scenario each mock juror was asked whether punitive damages should be awarded "to punish the company for reckless behavior." If the mock juror said such damages should be awarded, he or she was then instructed to chose from the following possibilities: $100,000, $1 million, $10 million, $100 million, or some other amount selected by the subject. *Id.* at 554.

91. Steven Garber, *Punitive Damages and Deterrence of Efficiency-promoting Analysis: A Problem with a Solution?*, 52 Stan. L. Rev. 1809, 1810 (2000).

92. *Id.* at 1817.

93. Robert MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52 Stan. L. Rev. 1821, 1827 (2002).

experimental research comparing judge and jury decision-making. She concluded:

> the research examining the processes by which jurors determine punitive damages suggests that jurors take into account important characteristics of the cases in making their punitive awards . . . . [J]urors do not appear to make decisions that clearly differ from the decisions that judges would make, certainly not to the extent that most critics of the jury would suggest.[94]

Thus, non-Exxon experimental research reveals a more complex picture of jury decision-making than the Corporate Brief presents. That picture is far more consistent with the data from real-world studies of jury verdicts than is the Exxon Research.

CONCLUSION

The Corporate Brief provides no reliable or credible evidence for concluding that juries are incompetent to decide punitive damages. This is especially so in cases involving claims for fraud, bad faith, and other intentional torts–like the ones at issue in this case—which were not studied in the Exxon Research experiments. In contrast, the social science consensus and non-Exxon mock jury studies suggest that juries are rational punitive damages decision-makers. There is no more basis for this Court to transfer greater punitive damages responsibility to judges than there is to transfer many other damages and liability issues that juries decide.

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94. Jennifer Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 158 (2002).

Respectfully submitted,

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APPENDIX

No. 01-1289

In the
Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Petitioner,

v.

CURTIS B. CAMPBELL AND INEZ PREECE CAMPBELL,
Respondents.

On Writ Of Certiorari
To the Utah Supreme Court

Brief Amici Curiae Of Certain Leading Social Scientists and Legal Scholars In Support Of Respondents

For the convenience of the Court and for purposes of identification, brief biographical sketches of *amici curiae* follow:

Theodore Eisenberg is the Henry Allen Mark Professor of Law at Cornell Law School. He is the author of two casebooks and dozens of law-related empirical studies. His work has appeared in leading peer-reviewed journals in several disciplines (e.g., *Journal of the American Statistical Association*, *Journal of the Royal Statistical Society*, *Journal of Financial Economics*, *Law & Social Inquiry*, *Journal of Legal Studies*, and *American Law & Economics Review*) as well as in leading traditional law reviews (e.g., *Harvard Law Review*, *Yale Law Journal*, *Univ. of Chicago Law Review*, and *Stanford Law Review*).

Appendix

He is a past or present member of the editorial boards of the *American Law & Economics Review*, *Law & Society Review*, and the *Justice System Journal*, and served as chair of the Law and Social Science Section of the Association of American Law Schools. He has been a National Science Foundation and American Bar Foundation grantee.

Neil Vidmar is the Russell M. Robinson II Professor of Law at Duke University School of Law. He holds a Ph.D. in social psychology and conducts empirical studies of the legal system, including civil and criminal juries and punitive damage awards. He is co-author of *Judging the Jury* (1986), *Medical Malpractice and the American Jury* (1995), *World Jury Systems* (2000), and over one hundred articles in scholarly journals and law reviews (e.g. *Stanford Law Review*, *Virginia Law Review*, *Law and Human Behavior*, *Wisconsin Law Review*, *Law and Society Review*, *DePaul Law Review*, *Brooklyn Law Review*, and the *Harvard Journal on Legislation*). He is a present or past member of the editorial boards of *Law & Human Behavior*, *Law & Society Review*; *Psychology, Public Policy and Law*, *Law & Social Inquiry*, *Journal of Applied Social Psychology*, *Psychology, Crime and Law*, *Legal and Criminological Psychology*, and the *Canadian Journal of Law and Society*. He is a co-principal investigator on a study of Arizona civil juries supported by the State Justice Institute and the National Science Foundation.

Kevin M. Clermont is the Flanagan Professor of Law at Cornell Law School. He is the author of several books, including *Materials for a Basic Course in Civil Procedure* (7th ed. 2001) (with Field & Kaplan), as well as many empirical studies of civil litigation.

Appendix

Stephen Daniels is a Senior Research Fellow at the American Bar Foundation in Chicago, IL and an Adjunct Professor of Political Science at Northwestern University. He has written on trial courts, juries, plaintiffs' lawyers, and the politics of civil justice reform—including the areas of medical malpractice, products liability, and punitive damages. He is co-author (with Joanne Martin) of *Civil Juries and the Politics of Reform* (Northwestern Univ. Press, 1995), and author or co-author of numerous articles in law reviews and social science journals focusing on law and public policy. He has testified before congressional and state legislative committees on the subject of civil justice reform, and served as an expert in cases dealing with large jury awards and/or constitutional challenges to civil justice reform. He is currently (in collaboration with Joanne Martin) completing a large-scale study of plaintiffs' lawyers.

Ronald C. Dillehay is Director of the Grant Sawyer Center for Justice Studies and Professor of Psychology, University of Nevada, Reno. His doctorate is in social psychology. He has authored or co-authored three books and more than fifty articles and chapters concerning applications of social psychology to law as well as basic social psychology. A number of these publications focus on methodological issues. For the last twenty-five years he has conducted research—both in the laboratory and regarding actual court cases—and published numerous peer-reviewed articles on juror and jury behavior on a number of topics. He has been qualified in both civil and criminal cases, both in state courts and the federal system, as an expert on juror and jury behavior and has testified in court on twenty-eight different occasions in seven states. He has also testified by affidavit or declaration on many other instances in state and federal courts.

Thomas A. Eaton is the J. Alton Hosch Professor at the University of Georgia School of Law, where he has taught for more than twenty years. He has published articles on his empirical research on punitive damages and tort litigation in the *Georgia Law Review*, the *Yale Law and Policy Review*, and *Yale Journal on Regulation*.

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Solomon M. Fulero is Professor of Psychology at Sinclair College, and Clinical Assistant Professor of Psychology at Wright State University, School of Medicine, Department of Psychiatry, both in Dayton, Ohio. He received a Ph.D. in Psychology from the University of Oregon in August 1979, and a J.D. from the University of Oregon School of Law in December 1979. He is both a licensed psychologist and an attorney. He is a Fellow of the American Psychological Association, and President-Elect of the American Psychology-Law Society, the major organization for the field of legal psychology. Dr. Fulero is Associate Editor of *Law and Human Behavior*, and is on the editorial board or is a reviewer for many other journals. He has published numerous articles in scholarly journals and law reviews, primarily on topics related to legal psychology, including jury behavior and eyewitness testimony. He is co-author of one of the leading texts in psychology and law, Wrightsman and Fulero, *Forensic Psychology*, (2d ed. in press). His work has been cited by

the U.S. Supreme Court in *Atkins v. Virginia*, __ U.S. __, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), and by numerous appellate courts other legal decisions.

Marc Galanter is John and Rylla Bosshard Professor of Law and South Asian Studies at the University of Wisconsin-Madison and LSE Centennial Professor at the London School of Economics. He received degrees in philosophy and law from the University of Chicago. In addition to the University of Wisconsin and the London School of Economics, he has taught at Chicago, Buffalo, Columbia and Stanford. From 1990 to 1998, he was Director of Wisconsin's Institute for Legal Studies, one of the leading centers for empirical study of the legal system, and now serves as Chair of the Institute's Board and Director of the Institute's Dispute Processing Research Program. He is the author of four books and over one hundred articles on litigation, lawyers, and legal culture, including articles on jury trials and on punitive damages. He has been editor of the *Law & Society Review*, President of the Law and Society Association, Chair of the International Commission on Folk Law and Legal Pluralism, a member of the Council on the Role of Courts, a Guggenheim Fellow, and a Fellow of the Center for Advanced Study in the Behavioral Sciences. He is a member of the American Law Institute and a Fellow of the American Academy of Arts and Sciences.

Elizabeth A. Graddy, Ph.D., is a Professor in the University of Southern California's School of Policy, Planning, and Development, and Director of the School's Program in Public Policy. Her expertise is in industrial organization economics, public policy, and quantitative analysis. Her research focuses on how information asymmetry and uncertainty affect institutional choice and effectiveness, and how organizational structure affects performance,

particularly the role of ownership (public, nonprofit, and for-profit). These interests have led to numerous articles in scholarly journals that address the structure and performance of a variety of institutions and organizations, including juries and products liability outcomes, licensing boards and regulatory outcomes, and governance structures and service delivery outcomes. Her current work is focused on the structure and performance of healthcare, philanthropic, and nonprofit organizations.

Edith Greene, Ph.D., is Professor of Psychology at the University of Colorado, Colorado Springs. Her research interests are in applied social and applied cognitive psychology, with specific research in psychology and law. Her research areas include jury decision-making, eyewitness testimony, biases in reasoning and judgment, and psychological research techniques for litigation. Her co-authored book, *Determining Damages: The Psychology of Jury Awards*, will be published by APA books in December 2002. She has published many articles on jury decision-making in peer-reviewed journals. Funding agencies that have supported her research include the National Institute of Justice and the National Science Foundation.

Valerie P. Hans is Professor of Sociology and Criminal Justice at the University of Delaware. She holds a Ph.D. in Psychology from the University of Toronto. Professor Hans has conducted research and written widely about various aspects of the jury system, including jury selection, juror prejudice and bias, the group decision-making process, jury reform, and jury damages. *Judging the Jury* (1986), co-authored with Duke Law School's Neil J. Vidmar, has been cited frequently by academics, lawyers, and the courts. Her book, *Business on Trial: The Civil Jury and Corporate Responsibility* (2000), examines how

civil jurors decide on liability and damages for business corporations. She has collaborated with researchers from the National Center for State Courts on a field experiment examining the impact of allowing jurors to discuss evidence during the trial, and on a national study of the factors leading to hung juries.

Irwin A. Horowitz is Professor of Psychology at Oregon State University. He has published over forty-five research articles in peer-reviewed research journals and law journals directly concerned with jury decision-making. He is the co-author of two textbooks on the psychology of law and he has been, and currently is, the principal investigator of numerous research grants from the National Science Foundation.

Saul Kassin is Professor of Psychology at Williams College. He holds a Ph.D. in social psychology. In 1984, he was awarded a U.S. Supreme Court Judicial Fellowship, and spent the year at the Federal Judicial Center studying Rule 11 of the Federal Rules of Civil Procedure. In 1985 he was a postdoctoral fellow and visiting professor in the Psychology & Law Program at Stanford University. Dr. Kassin is author of the textbooks *Psychology* (Prentice Hall 3d ed. 2001) and *Social Psychology* (Houghton Mifflin 5th ed. 2002). He has also published numerous research articles on jury decision-making and has co-authored or -edited such scholarly books as *The American Jury on Trial: Psychological Perspectives* (1988), *The Psychology of Evidence and Trial Procedure* (1985), and *In the Jury Box: Controversies in the Courtroom* (1987). Dr. Kassin has served on a number of editorial boards and has been on the editorial board of *Law and Human Behavior* since 1986.

Thomas H. Koenig is a full professor and interim chairperson of the Department of Sociology and Anthropology at Northeastern University in Boston. He is a founding faculty member of Northeastern's Law, Policy and Society doctoral program. He is the co-author (with Professor Michael Rustad) of *In Defense of Tort Law* (NYU Press 2001), which focuses on dispelling popular misconceptions about tort verdicts. He has published numerous articles on his empirical research on punitive damages in journals such as the *Wisconsin Law Review*, *Univ. of Michigan Journal of Law Reform*, *North Carolina Law Review*, *Suffolk University Law Review*, *Justice System Journal*, *American University Law Review*, *Washington Law Review*, *Rutgers Law Review*, and *Brooklyn Law Review*.

Stephan Landsman is the Robert A. Clifford Professor of Tort Law and Social Policy at DePaul University College of Law and a nationally recognized expert concerning the history and operation of the jury system. He has written extensively on the nature and implications of adversarial justice. His scholarly work also includes a series of empirical studies of topics ranging from the effects of bifurcation on jury adjudication of punitive damages and the impact of potentially biasing materials on judges and jurors to the effect of hearsay evidence on juror decision making.

Joanne Martin is the Associate Director of the American Bar Foundation. Her research over the past twenty years has focused on jury verdict patterns, tort reform, the personal injury bar, and legal education. With collaborator, ABF Senior Research Fellow, Stephen Daniels, she co-authored the book, *Civil Juries and the Politics of Reform*, which presented an empirical examination of civil jury activity and its place in the construction of tort reform. She and Daniels are currently engaged in a study of the plaintiffs'

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James T. Richardson, J.D. Ph.D., is Professor of Sociology and Judicial Studies at the University of Nevada, Reno, where he also directs the graduate program in Judicial Studies for trial judges, offered in conjunction with the National Judicial College and the National Council of Juvenile and Family Court Judges since 1988. He teaches a Social and Behavioral Science Evidence course in this program, focusing on social science evidence and on research on juror behavior. He also has been a faculty member since 1968 in the Interdisciplinary Doctoral Program in Social Psychology, where he has taught Social Psychology and Law courses that focus on jury behavior. He has done research on various aspects of the judicial system, including how juries and judges deal with controversial parties and issues, the use of science in the courts and how such evidence is assessed by judges and jurors, and reforms of medical malpractice procedures. He has written or edited six books and nearly two hundred articles and chapters in books in his areas of interest.

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